Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

(3)

No. 99-1241

IN THE

Supreme Court of the United States

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,
Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents and natural guardians, MARY and KEVIN PECK and MARY PECK and KEVIN PECK, individually,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR RESPONDENTS MARSHALL L. JACOBS, M.D., WILLIAM I. NORWOOD, M.D. AND CHILDREN'S SURGICAL ASSOCIATES

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LIST OF PARTIES

The Petitioners in this Court are The Children's Hospital of Philadelphia, Nazareth Hospital and Norbert Froese, M.D. The Petitioners were Defendants in the underlying medical malpractice suits.

The Respondents are Michael Cunningham, Matthew Cunningham, James Cunningham, Mary Ann Cunningham, Stephen P. Gault, Karen M. Gault, Stephen R. Gault, Brian Peck, Mary Peck and Kevin Peck. The Respondents were Plaintiffs in the underlying medical malpractice suits.

The Defendants in the underlying medical malpractice suits who are not joined in the Petition are David Binder, M.D., Children's Surgical Associates, Ltd., Marshall L. Jacobs, M.D., David R. Jobes, M.D., Arnold S. Kessler, M.D., Stephen L. Kessler, M.D., KRN Associates, John D. Murphy, M.D., Susan T. Nicholson, M.D., Hooshang Nikoo, M.D., William I. Norwood, M.D. and Bruce Rubin, M.D.

The Respondents, Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd., support the Petitioners' Petition for a Writ of Certiorari and all averments contained therein and, as such, submit the following Memorandum pursuant to United States Supreme Court Rule 12.6. For the purposes of this Memorandum, the Respondents, Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd., incorporate the statements made in the Petitioners' Petition for a Writ of Certiorari which are contained under the "Question Presented," "Statement of Jurisdiction" and "Constitutional Provision Involved" sections of the Petition.

OPINIONS BELOW

Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd. adopt and incorporate herein the averments contained under the heading "Opinions Below" as written in the Petitioners' Petition for a Writ of Certiorari. Additionally, on September 18, 1998, the Philadelphia County Court of Common Pleas also denied Dr. Jacobs' Motion for Reconsideration. The Court of Common Pleas based its decision to deny Dr. Jacobs' Motion on reasons which were identical to those reasons given by the court for denying the Petitioners' Motion for Reconsideration. The September 18, 1998, Order denying Dr. Jacobs' Motion for Reconsideration is unreported, but has been reproduced in the Appendix to this Memorandum at page 1a. Moreover, for the same reasons, the Court of Common Pleas also denied the Motion for Reconsideration of Dr. Norwood and Children's Surgical Associates, Ltd., on September 18, 1998. The court's Order, dated September 18, 1998, denying the Motion for Reconsideration of Dr. Norwood and Children's Surgical Associates, Ltd., has not been reported, but has been reproduced in the Appendix to this Memorandum at page 2a.

STATEMENT OF THE CASE

Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd. endorse and incorporate in this Memorandum the statements contained under the heading "Statement of the Case" in the Petitioners' Petition for a Writ of Certiorari.

Furthermore, Dr. Jacobs is a defendant in *Peck v. Children's Hospital of Philadelphia,* No. 821, July Term 1994, one of the underlying cases in this matter which was instituted in the Court of Common Pleas of Philadelphia County in Pennsylvania. Just as the Petitioners' had been granted summary judgment against the Plaintiffs in this matter, the trial court had also granted summary judgment in favor of Dr. Jacobs and against the Plaintiffs. *See* the Petitioners' Petition for a Writ of Certiorari at 11a. The Plaintiffs never appealed the trial court's ruling to a higher court.

Additionally, Dr. Norwood and Children's Surgical Associates, Ltd. are defendants in the underlying matter of *Gault v. Children's Hospital of Philadelphia,* No. 3971, October Term 1994, which was instituted in the Court of Common Pleas of Philadelphia County in Pennsylvania. Similar to what occurred with the Petitioners, the trial court also granted summary judgment on behalf of Dr. Norwood and Children's Surgical Associates, Ltd and against the Plaintiffs in this matter. *See* the Petitioners' Petition for a Writ of Certiorari at 11a. The Plaintiffs did not appeal the trial court's ruling to a higher court.

After receiving the Plaintiffs' Petition To Open, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. timely filed a Response, in which they denied all material allegations contained in the Plaintiffs' Petition. Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. also joined in the Petitioners' Petition for a Scheduling Order in an effort to conduct discovery and to obtain an evidentiary hearing. In their Response to the Plaintiffs' Petition To Open and in documents subsequently filed with the trial court, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. raised issues which were identical to those asserted by the Petition-

ers in the Petition for a Writ of Certiorari. Nevertheless, notwithstanding these issues and requests, the trial court granted the Plaintiffs' Petition to Open and denied the Joint Petition for a Scheduling Order. Reconsideration of the trial court's ruling was sought and subsequently denied. Thereafter, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. petitioned the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania for appellate review of the trial court's orders on the same grounds as those asserted by the Petitioners. However, both tribunals denied these requests for appellate review of the trial court's rulings. *See* the Petitioners' Petition for a Writ of Certiorari at 104a, 106a, 111a-117a.

REASONS FOR GRANTING THE WRIT

Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd. incorporate in this Memorandum the statements contained under the heading "Reasons for Granting the Writ" in the Petitioners' Petition for a Writ of Certiorari. In accordance with Supreme Court Rule 12.6, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. hereby endorse the Petition for a Writ of Certiorari as they raised the same issues in the courts below. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 484 U.S. 135, 140, n.8 (1987); *Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Perini North River Associates,* 459 U.S. 297, 302-05 (1983); *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 783, n.14 (1980).

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS OF THE
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

In re Thomas Smith, Esquire	:	February Term, 1998 No. 1164
Re:		
Peck	:	July Term 1994 No. 821
v.		
Childrens' Hospital of Phila., et al.	:	**Docketed Civil Administration Sep 18 1998 C. KELLY Copies Mailed on 9/21/98**

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Motion for Reconsideration of Defendant Marshall L. Jacobs, M.D., the Application for Reargument[1] en banc, and Plaintiff's response thereto, it is hereby ORDERED that this motion is DENIED for the reasons set forth in the Memorandum Opinions dated August 20, 1998 and September 18, 1998.

BY THE COURT:

/s/
JOHN W. HERRON

[1]Defendants do not request oral argument. Rather, they seek reconsideration en banc.

IN THE COURT OF COMMON PLEAS OF THE
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

In re Thomas Smith, Esquire	:	February Term, 1998 No. 1164
Re:		
Gault	:	October Term 1994 No. 3971
v.	:	
Norwood, M.D., et al.	:	**Docketed Civil Administration Sep 18 1998 C. KELLY Copies Mailed on 9/21/98**

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Motion for Reconsideration of Defendants William Norwood, M.D. and Children's Surgical Associates, Ltd., their Application for Reargument[1] en banc, and Plaintiffs' response thereto, it is hereby ORDERED that this motion is DENIED for the reasons set forth in the Memorandum Opinions dated August 20, 1998 and September 18, 1998.

BY THE COURT:

/s/
JOHN W. HERRON

[1]Defendants do not request oral argument. Rather, they seek reconsideration en banc.